

NO. 46421-7

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, APPELLANT

v.

RODREA VONSHON BRADLEY, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Ronald Culpepper

No. 14-1-00580-8

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR.

1. The trial court erred in making findings of fact numbers 3, 4 and 5 because they are not supported by the record.
2. The trial court erred in making conclusions of law 2 and 4 because they are not supported by the record.
3. The trial court erred in making conclusions of law 2 and 4 because they are contrary to case law and legislative intent.
4. The trial court erred in sentencing defendant to an exceptional sentence downward of 14 months for reasons already encompassed by the purposes of the SRA.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Did the trial court err when it sentenced defendant to an exceptional downward sentence of 14 months for reasons already encompassed by the purposes of the SRA?

C. STATEMENT OF THE CASE.

1. Relevant Procedure and Facts

On February 13, 2014, the Pierce County Prosecutor's Office charged RODREA VONSHON BRADLEY, hereinafter "defendant" with one count of escape in the first degree after he failed to return to the ATC

program. CP 1. Defendant was found guilty after a jury trial and a sentencing hearing was held on June 6, 2014, before the Honorable Ronald Culpepper. CP 3, 34-47, 48-50; RP 3. Both parties agreed defendant's offender score was a 10 and pursuant to the SRA, his corresponding standard range sentence was 63 to 84 months. CP 34-47, 48-50; RP 3-5.

Prior to the hearing, defendant filed a motion for an exceptional sentence seeking a downward departure and asked to be sentenced to somewhere between 12 months and a day and 24 months in custody. CP 23-33; RP 10. At the hearing, the State asked the court to sentence the defendant to the low end of the standard range or 63 months. RP 5. After hearing argument, the court granted the exceptional sentence downward and sentenced defendant to 14 months in custody. RP 17. The court then entered the following findings of fact and conclusions of law regarding its decision to grant the exceptional sentence:

FINDINGS OF FACT

- (1) The defendant was found guilty as charged of one count of escape in the first degree following a jury verdict.
- (2) The defendant has an offender score of 10, and a corresponding standard range sentence of 63 to 84 months as determined by the SRA.

- (3) The defendant's ability to conform his conduct to the requirements of the law, was significantly impaired due to uncontrollable circumstances that he was presented with upon his initial release into the ATC program.
- (4) The defendant's offending conduct falls at the low end of the range of offending behavior contemplated by the escape first degree statute.
- (5) The standard range for defendant's conviction would result in a sentence much too long for his actual conduct, would not be a just but overly harsh result, would not make wise use of the State's resources and would not promote respect for Pierce County's system of justice.

CONCLUSIONS OF LAW

- (1) The court concludes that the foregoing mitigating factors constitute substantial and compelling reasons to justify an exceptional sentence below the standard range in this case.
- (2) The underlying purposes of the SRA would be furthered by the imposition of a downward departure in this case, ie punishment proportionate to the seriousness of the crime.
- (3) The defendant RODREA BRADLEY shall be sentenced to an exceptional sentence downward departure of 14 months in the Department of Corrections with CFTS 43 days. All other conditions of the sentence are outlined in the Judgment and Sentence issued under this cause.

(4) A 63 month sentence is too excessive for the offending conduct committed. The public would still be protected by an exceptional sentence, downward departure.

CP 48-50.

The State filed a timely notice of appeal. CP 51-55.

D. ARGUMENT.

1. THE TRIAL COURT ERRED IN GRANTING AN EXCEPTIONAL SENTENCE DOWNWARD AND BASING ITS REASONS ON PURPOSES ALREADY ENCOMPASSED BY THE SRA.

The Sentencing Reform Act (hereinafter SRA) states that:

To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585 (formerly RCW 9.94A.210(4), *recodified* in 1989).

Courts have construed this statute to establish three prongs, each with its own corresponding standard of review. The appellate court analyzes the appropriateness of an exceptional sentence by answering the following three questions under the indicated standards of review:

1. Are the reasons given by the sentencing judge supported by evidence in the record? As to this, the standard of review is clearly erroneous.

2. Do the reasons justify a departure from the standard range? This question is reviewed de novo as a matter of law.
3. Is the sentence clearly too excessive or too lenient? The standard of review on this last question is abuse of discretion.

State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).

As to the second question, courts have held the SRA established a two part test to determine if a sentencing departure is justified as a matter of law:

In determining whether a factor legally supports departure from the standard sentence range, this Court employs a two part test: first, a trial court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range; second, the asserted aggravating or mitigating factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category.

Id., at 95 (citing *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997)).

Generally, a court must impose a sentence within the standard sentence range, but it may impose a sentence below the standard range if it finds, considering the purpose of the Sentencing Reform Act, that there are substantial and compelling reasons justifying such a sentence. RCW 9.94A.535. The legislature has stated a nonexclusive list of mitigating and aggravating factors that may support a sentence outside the standard range

if found by a preponderance of the evidence. RCW 9.94A.535(1).

The SRA requires factors that serve as justification for an exceptional sentence must relate to the crime, the defendant's culpability for the crime, or the past criminal record of the defendant. *State v. Law*, 154 Wn.2d 85, 88, 110 P.3d 717 (2005). The SRA prohibits considerations of factors unrelated to the crime and of factors personal in nature to a particular defendant. *Id.*, at 103.

The SRA was designed to provide proportionate punishment, protect the public and provide rehabilitation, and the presumptive ranges established for each crime represent the Legislature's judgment as to how best to accommodate those interests. *State v. Allert*, 117 Wn.2d 156, 169, 815 P.2d 752 (1991). Case law has routinely held that the purposes of the SRA, as stated in RCW 9.94A.010, are insufficient factors to justify a departure from the guidelines. *State v. Law*, 154 Wn.2d 85, 97, 110 P.3d 717 (2005). *See also State v. Pascal* 108 Wn.2d 125, 137, 736 P.2d 1065 (1987); *State v. Fowler*, 145 Wn.2d 400, 409, 38 P.3d 335 (2002); *State v. Freitag*, 127 Wn.2d 141, 145, 896 P.2d 1254 (1995). The legislature identified seven purposes for determining standard range sentences stating:

The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but

does not eliminate, discretionary decisions affecting sentences, and to:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve himself or herself;
- (6) Make frugal use of the state's and local governments' resources; and
- (7) Reduce the risk of reoffending by offenders in the community.

RCW 9.94A.010.

In the present case, the trial court erred when it imposed an exceptional sentence in the form of a downward departure based on reasons which are not justified as a matter of law under the SRA. Specifically, the trial court primarily relied upon its disagreement with the legislature's presumptive standard range as a basis for justifying a downward departure. When sentencing defendant, the trial court stated:

[h]is conduct is at the low end of the range here. 63 months in prison, I think, for what he did is way out of line. It isn't a just punishment. It's very harsh.

The SRA has this kind of a harsh trajectory upwards constantly. Of course, Mr. Bradley can avoid the consequences of the SRA by not committing felonies.... The public will be protected if he's in prison for some time; it doesn't have to be 63 months.

Again, I think a very harsh punishment isn't just and doesn't increase respect for the law. Some people think punishment is too lenient and that doesn't make them respect it, and if it's too harsh, it doesn't either, so I'm trying to make the right one. Frugal use of resources, it's very expensive to put people in prison.

RP 16-17.

Then, in the finding of facts and conclusions of law, the court wrote:

The standard range for defendant's conviction would result in a sentence much too long for his actual conduct, would not be a just but overly harsh result, would not make wise use of the States' resources and would not promote respect for Pierce County's system of justice.

...

The underlying purposes of the SRA would be furthered by the imposition of a downward departure in this case, ie punishment proportionate to the seriousness of the crime.

...

A 63 month sentence is too excessive for the offending conduct committed. The public would still be protected by an exceptional sentence, downward departure.

CP 48-50. All of the reasons the trial court outlined were already encompassed by the seven purposes in RCW 9.94A.010 the legislature contemplated when creating the standard sentencing ranges. Essentially, the trial court sentenced defendant to an exceptional sentence of 14 months in prison rather than the 63 months at the low end of his standard

range because the trial court disagreed with the legislature's presumptive sentencing range. Case law and the SRA explicitly prohibit this as a reason for justifying an exceptional sentence and imposing a downward departure.

In *State v. Pascal*, 108 Wn.2d 125, 137, 736 P.2d 1065 (1987), the Washington Supreme Court held that the trial court's subjective determination that the SRA ranges are unwise or that they do not advance these goals is not a reason justifying departure from the normal range and the fact that the defendant may not pose a threat to the public is not a reason supportive of an exceptional sentence. In 2005, this issue was raised again and the Court, after reviewing decades of case law, stated "we have consistently held that the purposes of the SRA, as stated in RCW 9.94A.010, are insufficient factors to justify a departure from the guidelines." *Law*, 154 Wn.2d at 97. The legislature has already taken into consideration the stated purposes in establishing the SRA and standard sentence ranges and thus, those purposes should not be used to justify an exceptional sentence outside of those ranges. See *State v. Pascal*, 108 Wn.2d 125, 137-38, 736 P.2d 1065 (1987).

By basing its reasons for the exceptional sentence on its disagreement with the standard sentence range determined by the legislature, the trial court in the present case explicitly went against

longstanding case law and the SRA. As described above, "the trial court's disagreement with the legislature's determinations [of standard sentencing ranges] cannot justify a departure." *Law*, 154 Wn.2d at 101. Because the trial court's reasons for imposing a downward departure exceptional sentence were already encompassed by the purposes of the SRA, the trial court's departure from the standard range sentence violated the first part of the test described in *State v. Ha'mim* and was not justified as a matter of law.

Defendant may attempt to argue that the trial court's finding of fact three justifies an exceptional sentence downward¹. The trial court's finding of fact three states "the defendant's ability to conform his conduct to the requirements of the law, was significantly impaired due to uncontrollable circumstances that he was presented with upon his initial release into the ATC program." CP 48-50. This finding of fact was an attempt to fit defendant's crime into one of the statutorily codified mitigating reasons that justify a downward departure under RCW 9.94A.535(1). Specifically, it attempts to fall under the reason that states "the defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law

¹ An exceptional sentence may be upheld on appeal even where all but one of the trial court's reasons for the sentence have been overturned. *State v. Gaines*, 122 Wn.2d 502, 512, 859 P.2d 36 (1993).

was significantly impaired. Voluntary use of drugs or alcohol is excluded." RCW 9.94A.535(1)(e). A review of the record at sentencing however shows that the trial court did not actually rely on this factor as a reason for justifying a downward departure.

Defense counsel filed a motion prior to the sentencing hearing which described how defendant's ability to conform his conduct to the requirements of the law was impaired. CP 23-33. It states that defendant "found himself in a position which made it impossible to comply with the rules and guidelines of the ATC program" because he was evicted from his home, did not have access to transportation, was unemployed with no source of income and was the sole provider for his two minor daughters whom he was trying to find housing for. CP 23-33. In *State v. Rogers*, the Washington Supreme Court held that the test under RCW 9.94A.535(1)(e) is "stringent" and if a trial court relies on the statutory language of RCW 9.94A.535(1)(e), there must be proof to meet that standard. 112 Wn.2d 180, 184-85, 770 P.2d 180 (1989). Specifically, the Court stated "the court must find, based upon the evidence, that those factors led to significant impairment of defendant's capacity to appreciate the wrongfulness of his conduct and to conform to the law." *Id.*

A review of the record in the present case shows that the trial court never made a finding that the reasons cited by defense counsel were

uncontrollable circumstances defendant found himself in and which led to defendant being unable to conform his conduct to the requirements of the law. Rather, the record supports the assertion that the trial court viewed those factors merely as excuses defendant gave for why he did not comply and the real reason behind the trial court's decision to impose an exceptional sentence downward was his disagreement with the standard sentencing range.

During the sentencing hearing, the trial court asked defense counsel about defendant's choices saying:

So back when he was brought back into custody and charged with this and after you had a chance to talk to him, why didn't he, quote, man up, unquote, and say "I screwed up; I should have done this"? Instead, I remember his motion, which was kind of silly, very frankly. "I didn't think I was on ATC because it didn't say, 'must do;' it said 'authorized': I didn't think that was a very persuasive motion. *Why not say "I screwed up and let's get this done" instead of having a trial and say "I didn't escape"? Because clearly, he did. Even if he didn't understand what the statute says, it says what it says.*

...
You say he's accepting responsibility for it. *It's a little easier to believe that if he accepts it right away instead of saying no, I didn't do it, and after the jury renders a verdict, which I think is fairly straightforward, now he accepts it.*

RP 11 (emphasis added). This interaction shows defendant's defense during trial was not that defendant was unable to comply with the requirements of the program due to uncontrollable circumstances; rather,

his defense was that he did not violate the statute as he did not understand what the statute required of him. Then later during the sentencing, the following interaction occurs between the court and defendant:

Defendant: ... Like I said, I know that I broke the law, but my intent wasn't criminal or it wasn't that I was trying to lower my stipulation of the group. The 12 days, I had both of my daughters. The only thing I was trying to do is find them a proper home so I could continue doing my legal responsibilities. I had to take my responsibilities as a parent so I can find a place to stay.

The Court: I understand that. You do have responsibilities as a parent. It's good you're concerned about them, but why not show up at Pierce County Alliance the day you were supposed to and say "Hey, I have my kids me (sic); I can't do it today; I'll have to come back"?

Defendant: I misunderstood the rules, Your Honor. The rules clearly state no children allowed at the building.

The Court: I agree that. They also say you've got to show up. *You couldn't get anybody to watch your kids, see, that's the problem. You make up these excuses and make it hard to be sympathetic.*

Defendant: Like I said, if I couldn't make it there, that I should call, and I tried, Your Honor. I do take responsibilities for not showing up.

RP 12-13 (emphasis added).

The trial court never makes a finding that defendant's ability to conform his conduct to the requirements of the law was significantly

impaired as required under ***Rogers***. Rather, the above interactions show the trial court viewed defendant's inability to comply with the ATC rules as excuses, not circumstances beyond his control as the findings of fact would like to make it appear. This, and the fact that the trial court's real reason for the downward departure is his disagreement with the presumptive sentencing range, is further supported by the trial court's statement to the prosecutor when he says "[o]n the other hand, Mr. Miller, the offense here is he had four months to go [on ATC] and blew it off. That's illegal, but is it worth really 63 months? Doesn't that seem a little high for not following up on a four-month sentence?" RP 13. Another example occurs when the trial court says:

He says he has some responsibilities to his kids, but one of his daughters is now in high school, so he's had responsibilities with her for years and he's been getting arrested all the time, so when did he become responsible? His conduct is at the low end of the range here. 63 months in prison, I think, for what he did is way out of line. It isn't a just punishment. It's very harsh.

RP 16.

Throughout the record of the sentencing hearing, it is evident that the trial court does not view the factors cited by defense counsel in her brief as uncontrollable circumstances which prohibited defendant from being able to conform his conduct with the requirements of the law. The record shows the trial court viewed these factors as excuses and the real

reason the trial court imposed the exceptional sentence downward was its disagreement with the presumptive sentencing range. Thus, while defendant may attempt to argue that his exceptional sentence is justified by finding of fact three because it is a statutorily codified mitigating reason, a review of the record shows there is no support for such a finding and it is not something the trial court actually relied upon in making its decision. As such, because the trial court's reasons for imposing an exceptional sentence downward were based entirely on its disagreement with the presumptive standard range and those reasons are already necessarily encompassed by the purposes of the SRA, the exceptional sentence is not justified as a matter of law.

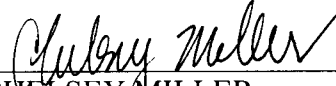
E. CONCLUSION.

For the foregoing reasons, the State respectfully requests the court reverse the trial court's imposition of the exceptional sentence downward

on escape in the first degree and remand for resentencing within the standard range.

DATED: November 7, 2014.

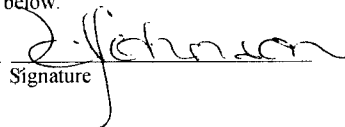
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